solve. I am only outlining an ideal. Nevertheless, unless something like this ideal is realized, we may well despair of the future of international law as relating to war. Punishment must follow crime with sufficient certainty to impress the criminally inclined. Punishment of the vanquished only, though better than nothing, fails of this certainty. It will be interpreted as revenge. Punishment of law breakers amongst the victors, as human nature goes, is unlikely except through neutral agencies.

The CHAIRMAN. We will continue the discussion of the topic before us, and I have pleasure in calling upon Mr. Edward A. Harriman, of the Bar of New Haven, Conn., formerly of the law faculty of Northwestern University, and of the faculty of Yale University, and one who has been conspicuously identified with the international law societies of both this country and Europe.

WHAT MEANS SHOULD BE PROVIDED AND PROCEDURE ADOPTED FOR AUTHORITATIVELY DETERMINING WHETHER THE HAGUE CONVENTIONS OR OTHER GENERAL INTERNATIONAL AGREEMENTS, OR THE RULES OF INTERNATIONAL LAW, HAVE BEEN VIOLATED?

ADDRESS OF EDWARD A. HARRIMAN,
Of the Bar of New Haven, Conn.

The simplest way to answer this question is to ask another: What means exist and what procedure has been adopted for authoritatively determining whether any agreement, or any rule of law, has been violated? The means ordinarily provided is a judicial tribunal, and the procedure adopted is a judicial procedure. The means, therefore, for determining whether an international agreement or a rule of international law has been violated should be a court, and the procedure before that court should be judicial procedure. It must be noted that so far as persons within the jurisdiction of the United States are concerned, the courts and the procedure already exist for the determination of questions of international law. To quote from one of our most distinguished American jurists, Simeon E. Baldwin,[1]

[1]American Bar Assn. Journal, I, 521.

> We were the first Power to recognize in the Constitution of our government the existence of such a thing as international law, and the duty of enforcing it. That instrument, it will be recollected, declares that Congress shall have power to define and punish "offenses against the law of nations." Uuder this provision, our Supreme Court has said: "A right secured by the law of nations to a nation or its people, is one the United States as the representatives of the nation are bound to protect," It is not necessary for Congress in passing a statute to punish an offense against that law, to declare it to be an offense against it. That it is such an offense is to be determined by reference to the law of nations itself. Congress simply gives it a further buttress.
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> Whatever international law may mean to other peoples, therefore, to us it is and always has been an acknowledged body of authoritative rules entitled to enforcement by the United States.[2]

The Constitution of the United States is, of course, subject to amendment, and the proposition laid down by Mr. F. E. Smith in his International Law (fourth edition, page 15), that "international law is not administered by municipal tribunals unless it has been adopted by the State legislature, and such adoption will not be presumed," holds good, even in this country; but the adoption by the people as the supreme legislative body in their organic law, the Federal Constitution, of international law, as part of the municipal law of the United States, was not a temporary adoption, but, as we believe, an adoption for all time. This adoption is a self-imposed limitation on the rights of the United States as a sovereign power. With the independence of our three departments of government, it may be that the executive or the legislative department can violate the rules of international law without effective interference by the judicial department, but the control which the judicial department in any case can exercise over the executive or legislative, depends not upon the physical force of the nine men who constitute the Supreme Court of the United States, but upon the force of the popular will which supports the power of the judiciary. Our sovereign, the people, voluntarily recognizes the obligations of international law. Other sovereigns, less humble, may or may not do the same. When the sovereign is an individual monarch ruling by divine right, and speaking in his edicts as the mouthpiece of the Almighty, recognition of international law as limiting his freedom of action, might be embarrassing. To a free people, however, with a democratic

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[2]See *The Paquete Habana*, 175 U. S., 677, 700; Hilton *v.* Guyot, 159 U. S., 113, 163; U. S. *v.* Arizona, 120 U. S., 487, 488.

government, the assertion of rights under international law and the acceptance of obligations under the same law, are inseparable acts essential for the preservation of the reign of law upon which, as opposed to the reign of force, free civilization must always depend.

Conceding then, that international law in any country depends for its effect upon its adoption by the municipal law of that country, there is no inherent obstacle to the adoption by all free countries of international law as a part of their municipal law. It is probable that all of the American republics could be induced to follow the example of the United States in this respect, if they have not already done so, and it does not seem at all impossible that England, France and several of the smaller European countries should follow suit. The mere adoption, however, of the rules of international law as part of the municipal law of various nations, will have but limited practical results. The courts of the different nations would disagree as to what those rules are, and to establish a uniform rule, a supreme judicial tribunal would be necessary. It seems entirely out of the question at the present time to constitute a tribunal having the broad powers with reference to nations which the Supreme Court of the United States has with reference to the States. It was difficult enough for the American colonies, speaking the same language and inheriting the same institutions, to form a federal government. It seems out of the question for nations with different languages and different institutions to abdicate their sovereignty so far as to create any supreme federal tribunal. It is not an impossible thing, however, for nations which disagree to submit by treaty particular controversies to the judicial determination of a tribunal selected for that purpose. Plans for the organization of such a tribunal have not fully matured and have been postponed by the great war.

There are some people who are now making very merry over what seems to them the absolute failure of all attempts at the settlement of international controversies in a peaceful manner. *Inter arma silent leges* is an ancient maxim which is proving all too true, but there never was any such maxim and never will be, as *Post arma silent leges*, which seems to be the creed of some of the worshippers of Mars. The existence of law is not disproved by the violation of the law. This is the true answer to those who say that there is no international law, and yet, we Anglo-Saxon lawyers are by tradition impatient with any theories of law that have no practical application. *Ubi jus, ubi reme-*

dum, is the basis of the reasoning of the lawyer, as distinguished from that of the philosopher. Our jurisprudence has developed, not from principle, but from procedure. The evolution of rights has followed the evolution of writs. We demand, therefore, that if international law is to mean anything, there shall be some practical redress for those who are injured by its violation.

It is needless here to elaborate all the arguments which have been made and which the American Society for the Judicial Settlement of International Disputes has done so much to promulgate, to show that it is perfectly possible for nations to agree upon the organization of a judicial tribunal and to agree to submit for the determination of that tribunal specific controversies to be determined according to rules of law agreed upon to govern the tribunal. Beyond this we can not as yet go, but certain further steps in the same direction are possible and desirable. The first is an agreement upon an international code or upon portions of an international code by as many nations as possible. When the principles of law which are to govern the controversy are agreed upon, it will be easier in the first place for the parties themselves to settle the controversy by agreement upon the application of those rules to the particular case; and, in the second place, if they can not agree as to the result, to agree that an impartial judicial tribunal shall apply the rules of law to the facts of the particular controversy.

Another step in advance which is not at all impossible is an agreement upon a court or a permanent organization from which in some manner the judges of the particular controversy shall be chosen, perhaps as a struck jury is chosen, by striking from the panel those to whom the other party objects. Instead of beginning with the ideal of a federation of the world, a parliament of man and a supreme court of humanity, we must begin with the particular and the specific if we are to accomplish anything of important practical value. Probably a code of international law for the world is out of reach at the present time or in the near future, but it is by no means certain that a code of international law for the American republics is out of reach, or that the labors of those jurists who are now at work on such a code will prove in vain.

The Hague Court of Arbitral Justice at the present time is hidden by the battle smoke that floats so near the Palace of Peace, but a Pan American Court for the decision of controversies between American

republics does not seem to be an empty dream. At present we are witnessing in Europe not simply a war of great Powers, but a war of ideals. It is one of the great crises of the world's history when the struggle is not merely between nations at war, but between creeds;—the creed of the free-booter, "The good old creed, the simple plan, that he should take who has the power, and he should keep who can," and the creed of the lawyer that the power of the sword exists for the protection of human rights, which the sword may destroy but does not create. The most pacific advocate of the reign of law does not despise the protection of a policeman against the highwayman, but he does not bow down and worship the policeman, nor does one who advocates adequate preparation for national defense thereby become, as some would have us think, a believer in militarism.

The essential limitations on the jurisdiction of any international court are sometimes overlooked by those who advocate the creation of such a court. Certain positions not recognized as part of international law have been taken as matter of policy by particular nations from self-interest or from a desire for self-preservation. It is too much to expect that these nations will agree to abandon claims which they have thus made simply because such claims are not consonant with the general principles of international law. Thus, for example, the Monroe Doctrine of the United States is a doctrine in support of which the United States in the past has been willing to fight. If the United States should become either too proud or too humble to fight for the Monroe Doctrine, that doctrine will disappear; but so long as the United States is prepared to exercise force in support of that doctrine, as it has been in the past, the doctrine becomes an important factor in international relations, although it is not a rule of international law.

Another inherent limitation on the jurisdiction of the international court, is the fact that the doctrine of the equality of States is a fiction. "This fiction," says Mr. F. E. Smith, "has no doubt reacted upon international sentiment, and in this way prevented much wrongful aggression, but it must be noted that it has little correspondence with the facts of international life." The States of the American Union are all equal before the law, and their equality, except perhaps temporarily in the South during the reconstruction period after our Civil War, has never been denied. The States are equal before the law; that is to say, when they appear before the United States Supreme Court, no State can claim any peculiar right or privilege as against any other

State. The States are not equal, however, in legislative power, for although by the Constitution they are given equal representation in the Senate, representation in the House of Representatives is based substantially upon population.

By analogy it may be possible to agree that, so far as the application of conceded rules of international law is concerned, great states and small shall be upon an equality before an international tribunal. Clearly, however, it is impossible that in the determination of what the rules of international law are which shall be applied by any international tribunal, weak states shall be upon an equality with the strong. Weak states in fact have been deprived in many instances of what are asserted to be the normal rights of a state, either with or without their consent. Belgium, Luxemburg and Switzerland have been neutralized and thereby deprived of the theoretical right to make war and to enter into any political alliance with other states. Cuba has been placed by the Platt Amendment under the protection of the United States with reference to its foreign relations. The Monroe Doctrine asserts the right of the United States to prevent colonization in this hemisphere by any European Power, and the appropriation by any European Power of additional territory in this hemisphere. It thereby operates as a limitation upon the right of European Powers to acquire territory, and upon the right of other American Powers to dispose of territory to such European Powers. With reference to the application of the Monroe Doctrine to the controversy between Venezuela and Great Britain, an English critic says with reference to our claims:

> If the claims then made are sanctioned by acquiescence so as to become a portion of international law, the doctrine of equality may be finally banished from our text-books, to be replaced by a legal hegemony on the part of the United States over the whole of the American continents.

At the time of the present Pan American Congress it seems appropriate to point out that the Monroe Doctrine as enunciated by President Monroe, was not simply in the interest of the United States, but in the interest of all American states. If the assertion of the Monroe Doctrine at the present time gives offense to our Latin-American neighbors, some of whom have increased and prospered so greatly since its original promulgation, it should be remembered that

it is the assertion of that doctrine by the United States which has operated for the protection of the weaker American republics against the greater strength of the European Powers. The remedy, therefore, for any dissatisfaction on the part of our neighbors, is not the abandonment of the Monroe Doctrine by the United States, but the joinder of the other American republics as parties to that doctrine, so that it shall become not simply an American, but a Pan American doctrine for the protection of the Western Hemisphere.

This paper was prepared some weeks ago, and the fact that since it was written the suggestion above made has received the strongest support in official quarters, should not be overlooked. Whether the Monroe Doctrine was English, or American, or Pan American in its origin, is a question which may be left to historians to discuss, but the incalculable benefit of that doctrine to every nation in the Western Hemisphere has been made so obvious by the present European war that the future of that doctrine as a permanent Pan American doctrine seems assured.

The practical steps to be taken in answer to the question asked at the beginning of this paper, are as follows:

First, as soon as the present war is over, a serious effort should be made to complete the organization of the Permanent Judicial Court at The Hague.

Second, a code of international law should be prepared to which the consent of as many nations as possible should be obtained, and this consent should be in the form of a treaty providing that as between the nations consenting to any particular article, that article shall constitute the law on that point in any dispute between such nations. "The most certain guide, no doubt," says Mr. Justice Gray, in Hilton *v.* Guyot, 159 U. S., 113, 163, "for the decision of such questions, is a treaty or statute of this country."

Third, without going into details, the procedure before the Permanent Judicial Court should be judicial in character. Here there is great room for the work of experts in devising a form of procedure which shall be reasonably intelligible and satisfactory to those lawyers and judges who are familiar with common law procedure, on one side, and to those who are familiar with the civil law procedure, on the other. Certain rules, as general as possible, should be laid down, and in other respects the details of procedure should be left, as far as possible, to the agreement of the parties.

Fourth, where the parties have not agreed upon the rule of international law to be applied to the particular case, either by adherence to a general code, or by a specific treaty, like the Treaty of Washington which fixed the law for the arbitration of the *Alabama* claims made by the United States against Great Britain, the parties should be permitted to submit to the tribunal itself the determination of what the rules of international law are upon the question involved.

It will be noted that all these suggestions proceed upon the theory of the voluntary submission by the parties to a judicial determination of the controversy between them, and the criticism will undoubtedly be made that these suggestions fail to provide for the prevention of war because the parties may not agree to submit to a judicial decision. The answer to this criticism is simply that war can not be prevented by lawyers, and that it has not yet been prevented even by the clergy. The Constitution of the United States provided the most perfect judicial machinery for the settlement of controversies between the different States. No body of lawyers or jurists can hope to provide a more perfect system for the settlement of international disputes. Have we ever had greater statesmen than those who framed the Constitution of the United States? And yet, within seventy-five years from the time that Constitution took effect, the descendants of its framers were engaged in killing each other with a devotion and enthusiasm not surpassed by that of their ancestors. To expect that we lawyers can do for the world, made up of varied races, what our ancestors could not do for their own descendants having the same blood and speaking the same language, is to dream peacefully of Utopia.

On the other hand, to assert that our work as lawyers must be barren of result in international affairs, and that attempts to secure a judicial settlement of international disputes are useless because all Europe is at war, is as unreasonable as to declare that the United States Supreme Court is a useless institution because it could not prevent the war between the States. We should face our task as lawyers, owing a duty to our country and to the world, avoiding, on the one hand, the presumption of exaggerating the nature of our task, and, on the other, the folly of refusing to do what we can, simply because we can not do all that we might wish.

If this paper fails to answer the second question set for discussion this morning, "In case of violations of international law, what should

be the nature of the remedy, and how should it be enforced?" it is for two reasons: First, limitation of time, and, second, the fact that as against the nation violating rules of international law and refusing to submit to a judicial decree fixing the consequences of that violation, there is only one remedy, that of force. How that force should be organized and to what extent the injured nation should receive the assistance of other nations as against the violator of the law, is a matter which is not yet ripe for discussion from a legal standpoint, but at present falls wholly within the domain of international politics and diplomacy.

The CHAIRMAN. The Chair regrets to announce that our Latin American friends, whose papers are listed for today, are not able to be present. Their papers will be reported, and will not be submitted at this time. The meeting will now stand adjourned.

Thereupon at 12.15 p. m., the meeting adjourned.